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No. 85-644

In the Supreme Court of the United States

October Term, 1985

JOHN N. NAZARIAN,

Petitioner,

v.

MARY ANN NAZARIAN,

Respondent.

BEST AVAILABLE COPY

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

WILSON & LEEDS
ROBERT L. WILSON
2040 Avenue of the Stars
Suite 400
Los Angeles, California 90067
Telephone: (213) 277-1467
Attorney for Respondent
MARY ANN NAZARIAN

Westside Law Publishers Los Angeles, California (213) 477-0491

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RESPONSE TO PETITION FOR WRIT OF CERTIORARI

I.

THIS COURT IS WITHOUT JURISDICTION TO DECIDE THE ISSUES RAISED BY THE PETITIONER.

28 U.S.C. §1257 provides in part that:

> "Final judgments or decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court as follows: . . .

> 3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States."

Rule 21.1(h) of Rules of the Supreme Court of the United States provides that:

> (h) If review of the judgment of a state court is sought, the statement of the case shall also specify the stage in the proceedings, both in the court of first instance and in the appellate court, at which the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed upon by the court; such pertinent quotation of specific portions of the record, or summary thereof, with specific reference to the places in the record where the matter appears (e.g., ruling on exception, portion of court's charge and exception thereto, assignment of errors) as will show that the federal question was timely and properly raised so as to give this Court jurisdiction to review the judgment on writ of certiorari.
>
> Where the portions of the record relied upon under this subparagraph are voluminous, they shall be included in the appendix referred to in subparagraph 1(k) of this Rule."

In *Webb v. Webb* (1981) 101 S.Ct. 1889; 451 U.S. 493; 68 L.Ed. 2d 392, the Court held that where Petitioner

failed to raise her federal claim in the State courts and the State Supreme Court failed to rule on a federal issue, this Court is without jurisdiction to decide the issue. Accordingly, the Court dismissed a writ of certiorari which it had previously granted.

In so holding, the Court said:

> "It is a long-settled rule that the jurisdiction of this Court to re-examine the final judgment of a state court can arise only if the record as a whole shows either expressly or by clear implication that the federal claim was adequately presented in the state system. New York ex rel. Bryant v. Zimmerman, 278 U.S. 63, 67, 49 S.Ct. 61, 63, 73 L.Ed. 184 (1928); Oxley Stave Co. v. Butler County, 166 U.S. 648,655, 17 S.Ct. 709, 711, 41 L.Ed. 1149 (1897). . . .
>
> We cannot conclude on this record that petitioner raised the federal claim that she now presents to this Court at any point in the state-court proceedings. Thus, we confront in this case the same problem that arose in Cardinale v. Louisiana, 394 U.S. 437, 438, 89 S. Ct. 1161, 1162, 22 L.Ed. 2d 398 (1969): 'Although certiorari was granted to consider this question, . . . the sole federal question argued here has never been raised, preserved, or passed upon in the state courts below.' Citing a long history of cases, we stated there that '[t]he Court has consistently refused to decide federal constitutional issues raised here for the first time on review of state court decisions.' Ibid. We have had several occasions to repeat this rule since then, Tacon v. Arizona, 410 U.S. 351, 352, 93 S.Ct. 998, 999, 35 L.Ed.2d 346 (1973); Moore v. Illinois, 408 U.S. 786, 799,

92 S.Ct. 2562, 2570, 33 L.Ed.2d 706 (1972); Stanley v. Illinois, 405 U.S. 645, 658, n.10, 92 S.Ct. 1208, 1216, n.10, 31 L.Ed. 2d 551 (1972); Hill v. California, 401 U.S. 797, 91 S.Ct. 1106, 28 L.Ed.2d 484 (1971); University of California Regents v. Bakke, 438 U.S. 265, 283, 98 S.Ct. 2733, 2744, 57 L.Ed.2d 750 (1978) (opinion of POWELL, J.), and we see no reason to deviate from it now.

It is appropriate to emphasize again, see Cardinale v. Louisiana, supra, 394 U.S., at 439, 89 S.Ct., at 1163, that there are powerful policy considerations underlying the statutory requirement and our own rule that the federal challenge to a state statute or other official act be presented first to the state courts. These considerations strongly indicate that we should apply this general principle with sufficient rigor to make reasonably certain that we entertain cases from state courts only where the record clearly shows that the federal issue has been properly raised below.

In the first place, although the States are sovereign entities, they are bound along with their officials, including their judges, by the Constitution and the federal statutory law. Principles of comity in our federal system require that the state courts be afforded the opportunity to perform their duty, which includes responding to attacks on state authority based on the federal law, or, if the litigation is wholly private, construing and applying the applicable federal requirements. As the Court has elsewhere observed, this principal of comity requires

> 'a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways.' Younger v. Harris, 401 U.S. 37, 44, 91 S.Ct. 746, 750, 27 L.Ed.2d 669 (1971).

The principal of comity that stands behind the 'properly-raised-federal-question' doctrine is similar to the principle that stands behind the exhaustion-of-state-remedies doctrine applicable to federal habeas corpus review of the constitutional claims of state prisoners. We have described the latter doctrine as one based on 'federal-state comity,' Picard v. Connor, 404 U.S. 270, 275, 92 S.Ct. 509, 512, 30 L.Ed. 2d 438 (1971), and have described its function as reflecting

> ' 'an accommodation of our federal system designed to give the State the initial 'opportunity to pass upon and correct' alleged violations of its prisoners' federal rights.' We have consistently adhered to this federal policy, for 'it would be unseemly in our dual system of government for a federal district court to upset a state court conviction without an opportunity to the state courts to correct a constitutional violation.' ' Ibid. (Citations omitted).

There are also very practical reasons for insisting that federal issues be presented

first in the state-court system. The requirement affords the parties the opportunity to develop the record necessary for adjudicating the issue. It permits the state courts to exercise their authority, which federal courts, including this one, do not have at least to the same extent, to construe state statutes so as to avoid or obviate federal constitutional challenges such as vagueness and overbreadth. The rule also insures that if there are independent and adequate state grounds that would pretermit the federal issue, they will be identified and acted upon in an authoritative manner. Finally, if the parties to state-court litigation are required to present their federal claims in the state tribunals in the first instance, those issues will be adjudicated in the state courts where necessary to dispose of the case. In most instances, such a judgment will be supported by an opinion that may well obviate any reason for our giving plenary consideration to the case. In terms of our own workload, this is a very substantial matter.

For all of these reasons, we, as well as litigants seeking to bring cases here from the state courts, should take care to comply with the jurisdictional statute and our rules. Although it would avoid uncertainty and the expenditure of much time and effort if litigants identified in the state courts precisely the provisions of the Federal Constitution or the federal statute on which they rely, we have not insisted

> on such inflexible specificity. The inevitable result is that at times there have been differences of opinion as to whether the state courts have been afforded a fair opportunity to address the federal question that is sought to be presented here. At the minimum, however, there should be no doubt from the record that a claim under a federal statute or the Federal Constitution was presented in the state courts and that those courts were apprised of the nature or substance of the federal claim at the time and in the manner required by the state law. Otherwise, we cannot be sufficiently sure, when the state court whose judgment is being reviewed has not addressed the federal question that is later presented here, that the issue was actually presented and silently resolved by the state court against the petitioner or the appellant in this Court."
> 101 S.Ct.pp. 1892-1894.

Nowhere in his Petition For A Writ Of Certiorari does the Petitioner state:

(a) The stage of the proceedings, both in the court of first instance and in the appellate court at which the federal questions sought to be reviewed were raised;

(b) The method or manner of raising them; or

(c) The way they were passed upon by the court, as required by Rule 21.1(h) of this court.

The reason for Petitioner's failure to do so is obvious. He is raising the questions which he seeks this court to review for the first time in his Petition For A Writ

Of Certiorari. These questions were never presented to the California Courts by Petitioner.

Attached as Appendix "A" is a copy of the Topical Index and Table of Authorities from Petitioner's Opening Brief to the State of California, Court of Appeal, Second District.

Attached as Appendix "B" is a copy of the Topical Index and Table of Authorities from Petitioner's Reply Brief to the State of California, Court of Appeal, Second District.

Attached as Appendix "C" is a copy of the Table of Contents and Table of Authorities from Petitioner's Petition For Rehearing to the State of California, Court of Appeal, Second District.

Attached as Appendix "D" is a copy of the Topical Index and Table of Authorities from Petitioner's Petition For Hearing to the Supreme Court of the State of California.

In none of said Topical Indexes did Petitioner raise either of the two questions which he presents to this court in his Petition For A Writ Of Certiorari.

In none of said Tables of Authorities did Petitioner cite either the Fifth Amendment or the Fourteenth Amendment to the United States Constitution.

In his opening brief to the Court of Appeal of the State of California, Petitioner argued that he was denied due process in that his attorney in the original proceedings which occurred in November and December, 1976 and January and February, 1977, was ineffective; that antagonism existed between the trial judge and Petitioner's trial attorney; that the trial judge did not give due consideration to the evidence offered by Petitioner at trial; that the Court of Appeal referred

to only a few of his claimed errors and that at least eighty percent of his claims of error at trial were never accorded legitimate deliberation by any reviewing body.

His due process argument was summarized on page 15 of his opening brief to the Court of Appeal of the State of California as follows:

> "When a party is prevented from presenting the truth by an adverse party who lies, by an attorney who does not or cannot present evidence, by a trial judge who refuses to listen to the truth, by a court of appeals which does not deliberate upon claims of error, and by two Supreme Courts which will not hear the matter, it cannot be said that justice has been served just because the party had a so-called opportunity to be heard, when he in fact was not heard through no fault of his. The combined effect of the perjury and the insufficient presentation of evidence (even including appellant's testimony) by counsel (whether or not a consequence of counsel's reaction to the court's recurring criticism) is that appellant in fact did not have an opportunity to be heard. Appellant placed his cause in the hands of an attorney and a court over whom he had no control. In this case the result was the same as if appellant had not been at the trial at all."

Petitioner presented this argument in an attempt to establish that the combined effect of all of these claimed errors constituted extrinsic fraud which should result in an order vacating and setting aside the prior judgment.

The Court of Appeal responded to that argument.

However, Petitioner in the State Court proceedings did not contend that the distinction made by the courts and the legislature between extrinsic and intrinsic fraud constituted a violation of his right of due process nor that such distinction was a violation of the equal protection guarantees of the Fourteenth Amendment to the United States Constitution.

Therefore, this Court has no jurisdiction to re-examine the judgment of the California Courts in this case.

II.

THIS CASE DOES NOT INVOLVE AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE SETTLED BY THIS COURT.

Petitioner suggests that the decision of the California Courts in the instant case was mandated by the decision of this court in *U.S. v. Throckmorton,* (1878) 98 U.S. 61, 25 L.Ed. 93.

On page 7 of his Petition For A Writ Of Certiorari, Petitioner quotes a passage from the opinion of the Court of Appeal of the State of California wherein the Court said:

> "It is not for us to inquire what the law ought to be when the Supreme Court has emphatically informed us what the law is."

Thereafter, Petitioner urges this Court should reconsider the validity of the *Throckmorton* decision because it "involves an important question of law, which is currently unresolved, and which should be decided by this court." (Petition, p.10)

The *Throckmorton, supra,* decision did not involve a constitutional issue nor an interpretation of any

provision of the Constitution of the United States and is not binding upon the State Courts as evidenced by the fact that Petitioner cites decisions of the State Courts of Wisconsin which, according to Petitioner do not follow the "*Throckmorton supra* doctrine."

The reference in the opinion of the Court of Appeal of the State of California appended to Petitioner's Petition For A Writ Of Certiorari as Appendix "A" is to the California Supreme Court—not the United States Supreme Court.

Indeed, the only reference in said opinion to any Federal decision is a single reference to the *Throckmorton, supra,* decision which is contained in a quotation taken from the California Supreme Court decision in *Pico v. Cohn* (1891) 91 Cal.129. All other references contained therein are to California statutes and to decisions of the Supreme Court and Courts of Appeal of the State of California.

It is clear from the record in this case that the decisions rendered in the State Court proceedings below were based upon the law of the State of California and not upon Federal Law.

III.

THE DISTINCTION BETWEEN INTRINSIC FRAUD AND EXTRINSIC FRAUD AS ADOPTED BY THE CALIFORNIA COURTS IN DETERMINING WHETHER A COURT OF EQUITY SHOULD SET ASIDE A FINAL JUDGMENT DOES NOT VIOLATE THE EQUAL PROTECTION OR DUE PROCESS PROVISIONS OF THE UNITED STATES CONSTITUTION.

Under the Fourteenth Amendment "due process" emphasizes fairness between the State and the individual

dealing with the state, regardless of how other individuals in the same situation may be treated; "equal protection" emphasizes disparity in treatment between classes of individuals whose situations are arguably indistinguishable. *Ross v. Moffitt* (1974) 417 U.S. 600, 94 S.Ct. 2437, 41 L.Ed 2d. 341.

The guarantee of due process demands only that the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained. *Nebbia v. New York* (1934) 291 U.S. 502, 54 S.Ct. 505, 78 L.Ed 940.

> "Under traditional equal protection analysis, a legislative classification must be sustained, if the classification itself is rationally related to a legitimate governmental interest." *United States Dept. of Agriculture v. Moreno* (1973) 413 U.S. 528, 93 S.Ct. 2821, 2825, 37 L.Ed 2d 782.

The State of California certainly has a legitimate governmental interest in the finality of judgments and an end to litigation.

This interest was recognized and the reasonableness of the distinction between extrinsic and intrinsic fraud was discussed by the court in *In Re Marriage of Stevenot* (1984) 154 Cal.App.3d 1051, 202 Cal.Rptr.116, wherein the court said:

> "We now summarize our view of the present state of the law by which extrinsic fraud is an equitable basis for setting aside judgments and marital settlement agreements in family law cases, considering the foregoing holdings of our Supreme Court and the statutory amendments to Civil Code sections 5125 and 5127.

General Rule

After relief is no longer available under Code of Civil Procedure section 573 for mistake, inadvertance, surprise or excusable neglect, an otherwise valid and final judgment may only be set aside if it has been obtained through extrinsic, not intrinsic, fraud.

Extrinsic Fraud

Fraud is extrinsic where the defrauded party was deprived of the opportunity to present their claim or defense to the court, that is where they were kept in ignorance or in some other manner, other than from their own conduct, fraudulently prevented from fully participating in the proceeding. If a spouse discontinues adversary proceedings because of the specific representation of the other party and his or her counsel that the spouse will not have to pursue legal remedies to obtain an equal division of the community property, and an equal division does not take place, extrinsic fraud may be found to have occurred.

Extrinsic fraud is more likely to be found to exist where a party who is not represented by counsel is persuaded to enter into an inequitable agreement by the other party and their counsel.

The following acts constitute extrinsic fraud:

Concealment by one party of the existence of a community asset, or prevention of participation in the proceeding by the other party, including a failure to disclose to the court the inability of the other party to participate.

Failure to give notice of the action to the other party, or proceeding to obtain a judgment without the knowledge of the other party, while reconciled with him or her.

Convincing the other party not to obtain counsel because the matter is not going to proceed.

Completion of the dissolution after having represented to the other party that it would not proceed without further notice.

Fairness dictates that the managing spouse has no duty to evaluate assets and may take a position favorable to himself or herself as to the character of assets, and this is done without any warranty, either as to valuation or claims of separate property character, because these are issues on which reasonable minds may differ and an inaccurate opinion or a failure to give any opinion cannot be extrinsic fraud.

Intrinsic Fraud

Any fraud is intrinsic if a party has been given notice of the action and has not been prevented from participating therein, that is, if they had the opportunity to present their case and to protect themselves from any mistake or fraud of their adversary, but unreasonably neglected to do so.

When a claim of fraud goes to an issue involving the merits of the prior proceeding which the moving party should have guarded against at that time, or if the moving party was guilty of negligence in failing to prevent

the fraud or mistake or in contributing thereto, or failed to take advantage of liberal discovery policies to fully investigate their claim, any fraud is intrinsic fraud. A mutual mistake which would be sufficient to set aside a contract is not sufficient to set aside a valid judgment incorporating a marital settlement agreement. Even though a party is mistaken as to the law and the facts, this is an insufficient basis to set aside a valid judgment incorporating a marital settlement agreement, if the party reasonably could have discovered the mistakes.

When a party was represented by counsel, absent concealment, any fraud will usually be intrinsic. After separation, each party can take a position favorable to themselves as to the character and valuation of assets, and any failure of the other party to investigate the facts constitutes intrinsic rather than extrinsic fraud.

Duty

Spouses no longer have a fiduciary duty to each other, however, they do have a duty to deal witn the other in good faith with regard to the management and control of community property. This requires the disclosure of all community assets, but not their valuation unless the valuation or facts affecting the valuation are peculiarly within the knowledge of one spouse, and reasonable inquiry and use of discovery proceedings by the other spouse would fail to disclose them. Prior to the date of separation or the filing of a petition for dissolution, whichever occurs first, there exists a confidential relationship which imposes trust

and confidence between spouses. However, upon separation or the filing of a petition for dissolution, the confidential relationship ends and the parties deal with each other at arms' length. Thereafter, as to community property, except for concealment of a community asset or nondisclosure of information as to value peculiarly within the knowledge of one spouse, each spouse may take a position favorable to themselves as to separate or community character of property and its valuation, and representations to the other in this regard are made without warranty. Once spouses negotiate at arms' length, or in an adversary manner, neither owes the duty to the other which would be owed if the parties had a confidential relationship. The duty to disclose the existence of community assets continues until there has been a division of all such assets.

Public Policy

Two conflicting public policies come into play, the policy of giving each litigant the opportunity to have their day in court, and the policy of finality of judgments and an end to litigation. The Legislature has determined that during the time frame provided by Code of Civil Procedure section 473 there is a strong public policy in favor of allowing litigants their day in court. Thus, by a lesser showing than extrinsic fraud (mistake, inadvertance, surprise, or excusable neglect) public policy favors setting aside judgments under section 473. Once relief is no longer available under section 473, the public policy in favor of finality of judgments predominates, and the power to set

aside valid final judgments and marital settlement agreements incorporated therein should be only exercised when exceptional circumstances require that the consequences of res judicata be denied. Thus, during the period when relief under section 473 is available, there is a strong public policy in favor of granting relief and allowing the requesting party their day in court. Beyond this period there is a strong public policy in favor of the finality of judgments and only in exceptional circumstances should relief be granted."
154 Cal.App.3d at pp. 1068-1071.

CONCLUSION

Petitioner has failed to demonstrate that he was denied due process or equal protection of the laws in the trial court proceedings or the appellate proceedings and his Petition For A Writ Of Certiorari should be denied. In the alternative, the Petition For A Writ Of Certiorari should be dismissed for lack of jurisdiction.

Respondent should be awarded her costs incurred in opposing the Petition.

DATED: November ??, 1985

Respectfully submitted,

WILSON & LEEDS

By: _____

ROBERT L. WILSON

Attorney for Respondent
MARY ANN NAZARIAN

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1. Is the commencement of the six-month limitation of *C.C.P. section 473* tolled until discovery of the perjury which would otherwise justify relief from a judgment for intrinsic fraud?

2. Is such limitation tolled futher by the adverse party's false promise of compromise, so as to bring appellant's motion to vacate the judgment for intrinsic fraud within the time limit of *C.C.P. section 473*?

3. Is the six-month limitation of *C.C.P. sec. 473* applicable when the adverse party, subsequent to such time limit, expressly admits the perjurious conduct, so as to eliminate or at least mitigate the so-called "probability of interminable litigation?"

4. Was there a true adversary hearing at the trial when the adverse party produced evidence in petitioner's favor after testifying that she did not

have such evidence, at which time the trial judge refused to consider such evidence, saying that it no longer mattered; when there was nothing petitioner could have done to prevent the adverse party from failing to produce critical evidence on the issue of the character of marital property; when the trial judge also refused to consider the fact that the adverse party continually lied, even when that fact was demonstrated by petitioner; where petitioner was deprived of effective representation of counsel by the court's refusal to allow petitioner's counsel to present evidence regarding the nature of the marital property and by the threats and antagonistic attitude of the trial judge, compounded by time limitations and the divided attention of the trial judge resulting from a change in assignment during the trial?

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PROOF OF SERVICE BY MAIL

State of California

ss.

County of Los Angeles

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 11333 Iowa Avenue, Los Angeles, California 90025; that on November 7, 1985, I served the within *Response to Petition for Writ of Certiorari* in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

Clerk, United States
Supreme Court
One First Street, N.W.
Washington, D.C. 20543
(Original and forty copies)

John Nazarian, in pro per
1628 Crenshaw Boulevard
Los Angeles, California 90019

I declare under penalty of perjury that the foregoing is true and correct. Executed on November 7, 1985, at Los Angeles, California.

Joy Rivelli Miller
(Original signed)